(18)

No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF AMICUS CURIAE COALITION FOR SMALL DIRECT MARKETERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

The Coalition for Small Direct Marketers is an unincorporated association composed principally of small catalogers that market products by direct mail, and of businesses that supply goods and services to catalogers and to other direct marketers. The Coalition was formed for the purpose of demonstrating to this Court the severe, adverse consequences that would befall small direct marketers—and the corresponding burdens on interstate commerce that would occur—if the decision of the North Dakota Supreme Court were to be affirmed. The Coalition has 142 members. They are identified in Appendix A to this brief.

The median gross revenue for the last full fiscal or calendar year of the Coalition member companies was $8.5 million.[1] The median number of full-time employees for the same period for these companies was 50. Virtually all of the direct marketers in the Coalition send catalogs, advertising materials, or products by mail or common carrier into all 50 states, including rural and remote areas that otherwise would not be provided such a cornucopia of choices.

The Coalition member companies market a wide variety of products. A partial list of those products includes the following:

printing
computer supplies
automotive carpets
truck accessories
books
sporting goods
audio broadcast equipment
computer software
specialty light bulbs
wedding invitations and greeting cards
baby products
religious materials
video equipment
bedding and home furnishings
computer hardware
athletic lettering
dental prosthetics
gourmet foods
electronic components
orthotic/prosthetic supplies and parts
calculators
metalworking machinery and equipment
flowers
picture frames
wholesale plumbing fixtures and faucets
aquarium supplies
aviation software and pilot supplies
public safety and industrial safety equipment
automotive engine rebuilding supplies
beef
hunting and outdoor clothing and equipment
industrial abrasives
women's clothing
toys and educational materials
yacht racing equipment
consumer electronics
live plants
wholesale and retail aircraft and aircraft parts
medical supplies
jewelry
musical instruments
doll house miniatures
color image scanners
marine electronics
medical books
specialty papers
dental supplies
radio frequency and microwave electronic components

[1] All statistics reported are for those Coalition members that provided information relevant to a particular issue.

fruit
industrial equipment and supplies
portable displays
military apparel
alternative energy and energy conservation products
watches
children's clothing
tools and test equipment
self-education audios and videos
office supplies
baked goods such as cakes, pies, cookies and doughnuts
scientific instruments
swimwear
gardening products
awards
equine products
woodworking tools and supplies
silk underwear and outerwear

The interest of these Coalition members in this case, and that of the thousands of other small direct marketers who are similarly situated, is straightforward: If the decision of the Supreme Court of North Dakota were affirmed, heavy burdens resulting from calculating, collecting and paying use taxes for thousands of jurisdictions would be imposed on them.

Affirmance would cause such serious effects that suppliers of goods and services to the direct marketing industry very likely also would be harmed. In addition, the increased barriers to entry that such a decision would erect would in all probability permanently cripple the direct marketing industry by substantially reducing, or even eliminating, new entrants to the marketplace.

STATEMENT OF THE CASE

Amicus adopts the statement of the case by petitioner.

SUMMARY OF ARGUMENT

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held unconstitutional an attempt by a state to impose on an out-of-state mail order vendor the obligation to collect and pay use taxes when the only contacts with the state were by mail and common carrier. The Court based its decision in large part on the impediment to interstate commerce that would result from imposing a welter of complicated use

tax obligations, originating from multiple jurisdictions, upon mail order businesses.

The North Dakota Supreme Court in the instant case has attempted to unrealistically minimize the *Bellas Hess* Court's significant concerns about burdens on interstate commerce. The North Dakota court does so to justify the imposition of a duty on an out-of-state direct marketer to collect and pay use tax to its state under circumstances legally indistinguishable from *Bellas Hess*. None of the reasons cited by the North Dakota court justify its characterizations of these burdens as something less than undue.

The burdens that would result from use taxation by thousands of jurisdictions remain valid concerns. Administrative burdens would result from differing rates and exemptions, from differences in reporting times, frequency, and formats, and from continual changes in use tax laws. Direct financial harm to direct marketers would be caused by the need to hire additional personnel, by loss of orders, and by underpayment of use taxes by consumers. Severe enforcement burdens and legal uncertainty also would result from affirmance of the decision of the North Dakota Supreme Court. These burdens realistically cannot be lifted by computer technology, as speculated by the state court. Nor does the state's 01.5 percent deduction from the use tax for vendor administration significantly ameliorate these burdens, as the North Dakota court claims.

These burdens fall with special severity upon small direct marketers such as the members of the Coalition for Small Direct Marketers. Even the proponents of legislation in Congress to allow use taxes to be imposed on direct mail firms recognize that the burdens would be too severe for smaller firms.

ARGUMENT

I. THE DECISION OF THE NORTH DAKOTA SUPREME COURT IMPROPERLY DISREGARDS THE BURDENS ON INTERSTATE COMMERCE RECOGNIZED IN *BELLAS HESS*.

A. *Bellas Hess* Accurately Recognizes the Impermissible Burdens on Interstate Commerce That Would Result From Allowing Thousands of Jurisdictions to Impose Use Taxes on Out-of-State Direct Marketers.

In *Bellas Hess*, this Court was presented with an attempt by the State of Illinois to impose the obligation of collecting and paying use tax upon an out-of-state vendor that mailed catalogs and advertising flyers into the state, received orders for goods by mail, and sent its goods to customers in Illinois by mail or by common carrier. In rejecting such an attempt, the Court observed that:

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which . . . [the Court's decisions] have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.

Bellas Hess, 386 U.S. at 758 (footnote omitted).

This Court relied in great part upon the burdens that such taxation would impose upon interstate commerce:

> [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon Na-

> tional were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of local government."

Bellas Hess, 386 U.S. at 759-60 (footnotes omitted).

In support of its decision, this Court quoted with approval language from a House of Representatives Report that noted the "intolerable" burden that imposition of such an obligation would create for smaller companies:

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable.

Bellas Hess, 386 U.S. at 759 n.14 (quoting *Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R. Rep. No. 565*, 89th Cong., 1st Sess., 882 (1965)).

In conclusion, this Court observed that—

> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 760.

B. The Decision of the North Dakota Supreme Court Does Not Overcome the Concerns of Congress and This Court in *Bellas Hess* Regarding Burdens on Commerce.

The concerns of Congress and this Court regarding burdens on interstate commerce and on the businesses engaged in such commerce remain valid. Congress repeatedly, and recently, has refused to enact any statute permitting states or local jurisdictions to impose the burden of collecting and paying use taxes on out-of-state direct marketers under circumstances similar to those presented by *Bellas Hess*.[2] As to proposals to further regulate interstate commerce, the Coalition respectfully suggests that this Court, and especially state courts, should not rush in where Congress fears to tread.

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[2] *See generally State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985) [hereinafter "1985 Hearings"]; *see also Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) [hereinafter "1988 Hearings"].

Governmental representatives of the State of North Dakota have for some years taken a leading role in efforts to have Congress enact such a statute. In 1985, for example, Senator Mark Andrews of that state introduced a bill in Congress (S. 1510) to permit states to require out-of-state direct marketers with no physical presence in the state to collect and pay use taxes. See 1985 Hearings at 7. The North Dakota House of Representatives passed a resolution in 1987 calling upon Congress to enact legislation allowing states to impose such a use tax obligation on direct marketers. Appendix to the Petition for Writ of Certiorari [hereinafter "App."] at A58-A59. In 1987, a bill with that purpose (H.R. 1242) was introduced in the House of Representatives by Representative Byron Dorgan of North Dakota. See 1988 Hearings at 1 and 31-32. Governor Sinner of North Dakota testified before the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law in support of Representative Dorgan's bill. 1988 Hearings at 27-36.

North Dakota apparently gave up on Congress and acted unilaterally. In 1987, the North Dakota legislature amended that state's Use Tax Act, N.D. Cent. Code § 57-40.2 (Supp. 1991), to impose an obligation to collect and pay use tax under circumstances legally indistinguishable from those in *Bellas Hess*. The North Dakota Tax Commissioner undertook to enforce the amended statute by bringing a lawsuit against petitioner Quill Corporation, and the Supreme Court of North Dakota upheld the statute. App. at A1-A36.

That state court's decision was premised upon its own assessment of societal change in this country to which that court believed national constitutional jurisprudence must be tailored. According to the North Dakota court, the "economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests." App. at A11. Indeed, the North Dakota Supreme Court believed that, to adhere to the rule of *Bellas Hess*, this Court would have to "abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent." App. at A10.

The state court divined three principal theories for disagreeing with the *Bellas Hess* Court's expressed concerns about the burdens that would be imposed on direct mailers by having to compute, collect, record, report, and pay use taxes to hundreds or even thousands of jurisdictions. First, the state court opined that those concerns have been "seriously eroded" by the technological advances that have taken place over the space of "the past quarter-century." App. at A26. Now, that court decided, "computer technology" and "automated" systems could be used to alleviate such burdens. App. at A26. Second, this Court has, of late, "all but ignored the burdensome nature of imposition of the collection duty," according to

the North Dakota court. App. at A26. Third, the state court noted that, under the North Dakota statute, the seller is allowed to deduct a percentage (01.5 percent) of the use tax due, which further "alleviates any burdens" created by requiring the out-of-state seller to collect and pay these taxes. App. at A26; N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). The Coalition respectfully submits, and argues below, that these three theories are without merit.

II. THE HARMFUL EFFECTS OF OVERTURNING *BELLAS HESS* WOULD BE ESPECIALLY SEVERE FOR SMALL DIRECT MARKETERS.

Amicus respectfully disputes the conclusion by the North Dakota court that the burdens on direct mailers no longer support the result reached in *Bellas Hess*. Those burdens—which would be unfair and heavy for all direct marketers—apparently would prove to be fatal for many small businesses.

In *Bellas Hess*, this Court noted that sales taxes, and in most instances use taxes, were imposed by over 2,300 localities. *Bellas Hess*, 386 U.S. at 759 n.12 (citing data for the year 1965). The number of jurisdictions imposing use taxes today has nearly tripled, with most sources estimating the number between 6,500 and 7,000 jurisdictions.[3] The compliance burden on mail order companies has dramatically increased, not decreased, since *Bellas Hess*. National Bellas Hess was a relatively large company for the times, with net sales in 1961 of approximately $60 million, and with "a large number of retail

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[3] *See, e.g.*, Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 539 n.27 (1991) (citing Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* at 6 (1986) ("approximately 6,500 state and local jurisdictions" with use tax)); Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097, 1098 (1986) (stating that there were then 46 states, 1,192 counties, 5,100 cities, and 593 rapid transit locations imposing sales/use taxes, for a total of 6,931 jurisdictions).

stores in various States." *Bellas Hess*, 386 U.S. at 760-61 (Fortas, J., dissenting). Allowing for inflation since 1961, it was larger than any of the companies in the Coalition.[4] Because National Bellas Hess operated retail stores in a number of states, it presumably was obligated to collect sales and use taxes in those states.[5] Yet, this Court accurately recognized that, even for such a large company, the *additional* burden of requiring National Bellas Hess to collect use taxes for thousands of jurisdictions with which it had dealings only by mail order would be unbearable.

How does one even begin to describe, then, the magnitude of the burden on the heart of the direct mail industry, the small companies whose employees are measured in dozens or fewer? A telling indication of the serious nature of these multijurisdictional burdens for small companies is that even the *proponents* of imposing use taxes on out-of-state direct marketers concede that exceptions would have to be made for small businesses such as members of the Coalition. For example, in Congressional hearings on proposed legislation in 1985, James L. Martin, Legislative Counsel to the National Governors' Association, testified as follows:

> The governors also understand that sales tax collection efforts may be overly burdensome to small mail order sales businesses. Common sense dictates that they be exempt from compliance.

1985 Hearings at 78.[6] The National Conference of State Legislatures also realized "the need for some protection

[4] Only 10 Coalition members report gross revenue in excess of $60 million in 1991 dollars. Approximately two-thirds of the members have gross revenues of $15 million or less. Four members have gross revenues of less than $500,000 per year; 14 of them report having five or fewer full-time employees.

[5] *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).

[6] Similarly, in 1988 the National Governors' Association supported proposed legislation that, in its words, would apply to "only large firms with national or single state sales of tangible personal property in excess of reasonable de minimis levels nationally and in each state." 1988 Hearings at 35.

for very small businesses." 1985 Hearings at 68 (Testimony of Hon. David Nething, Majority Leader, North Dakota Senate, on behalf of the National Conference of State Legislatures ("NCSL")).[7] The Advisory Commission on Intergovernmental Relations ("ACIR") stated that "[c]ompliance costs appear to be a particularly serious problem for the numerous small firms, who do not make the bulk of the sales in mail order and direct marketing. The definition of 'small' is a critical component of any proposed legislation." 1985 Hearings at 32 (reproducing ACIR, *State and Local Taxation of Interstate Mail Order Sales (Preliminary Draft)*, at 22). ACIR advised that "[n]o action on taxation of interstate mail order sales should be undertaken without addressing the issue of compliance costs for small firms." 1985 Hearings at 33.[8]

This Court's existing use tax decisions endeavor to ensure, at least in an approximate way, that the burdens of collecting and paying use taxes will be imposed only upon firms of a size sufficient to have a reasonable prospect of surviving those heavy burdens. Under those decisions, only firms that are large enough to establish retail outlets, offices, sales forces, or some other form of "physical presence" in multiple jurisdictions will incur

[7] Significantly, Mr. Nething testified that NCSL did not decide on a specific dollar threshold for a de minimis exception, because of their "expectation that Congress in its review would be better able to judge the make-up of the industry and determine the extent of protections needed." 1985 Hearings at 68.

[8] ACIR further noted that "empirical evidence suggests that compliance costs are particularly a concern for small firms. . . . If a de minimis rule is adopted, the choice of an appropriate threshold would have to be based on carefully weighing the revenue and competitive considerations against the compliance costs." 1985 Hearings at 39-40.

the burden of collecting use taxes in those states. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941). In virtually every instance, those firms also will be collecting sales taxes in those states, and thus will have the personnel, facilities, familiarity with local laws and practices, and financial "staying power" to shoulder this burden without disastrous effects.

Under prevailing law, therefore, out-of-state firms that question their ability to handle the burdens of collecting use taxes can achieve a measure of predictability, and can gradually absorb these burdens as the business grows in size, by introducing a "physical presence" into additional states selectively and incrementally. They do not have to try to absorb the shock of instantaneously being subjected to these burdens from thousands of jurisdictions, as would occur if the North Dakota Supreme Court's decision were to be affirmed.

III. AFFIRMANCE OF THE DECISION BELOW WOULD IMPOSE HARSH COMPLIANCE BURDENS ON SMALL DIRECT MARKETERS, INCLUDING ADMINISTRATIVE BURDENS, FINANCIAL BURDENS, AND ENFORCEMENT BURDENS.

A. Numerous, Inconsistent State and Local Use Tax Laws Would Entangle Small Direct Marketers in a Web of Bureaucratic Regulations.

We respectfully suggest that the North Dakota Supreme Court failed to consider the practical problems of dealing with the multitude of confusing rates and exemptions established by the 6,000 to 7,000 taxing jurisdictions. For every individual order, the vendor would have to identify the state and all local taxing jurisdictions in which the customer resides, to determine how much tax to add and to which jurisdictions the tax on that item

would have to be remitted. States could be identified in most instances, but the location of an address within a local taxing district often would be problematic.

Then, for every particular item ordered, the vendor would have to identify the rate(s) of tax to be applied. These rates are not always uniform, even within a single state. North Dakota, for example, has different "bracket collection schedules" for use tax rates of 04, 04.5, 05, 06, 06.5, and 07.5 percent. All States Tax Guide (P-H) ¶ 1340 (June 11, 1991) [hereinafter "Tax Guide"]. Most, but not all, non-exempt direct marketing sales in North Dakota would be taxed at a five percent state rate. Tax Guide at ¶ 1340. However, local jurisdictions in North Dakota may in some circumstances add local taxes. For example, there is a local sales tax of one percent in Devil's Lake, Grand Forks, and Minot, and a one percent local sales-use tax in Bismark and (effective July 1, 1991) in Jamestown, plus a local sales-use tax of one-half percent in Fargo. Tax Guide at ¶ 1460 (June 11, 1991).

Rates also vary depending upon the nature of the product. Tax Guide at ¶ 1340. Thus, in North Dakota, as in other states, if a customer purchases multiple items in a single order, some items may be taxed at different rates than others. The mail order vendor would then have to determine if some or all of the items purchased are exempt from use tax. To convey a hint as to the incredible complexity of this process nationwide, a list of over 120 such exemptions enacted at the state level for North Dakota, *alone*, is set forth in Appendix B. Of course, each state will have its own list of exemptions.

Statutes also vary considerably on many items that commonly are sold by direct marketers, including such products as food and beverages, drugs, medical devices and supplies, prosthetics, machinery and equipment, computer software, coins, tobacco products, publications,

clothing, and numerous other items.[9] See generally Tax Guide at ¶¶ 5275 *et seq.* (March 21, 1989). Exemptions also may depend on the type of purchaser, or the use to which the product is going to be put, rather than on the nature of the product itself. Exemptions for educational institutions or uses, or for certain types of non-profit entities, for example, are common. Real-world examples make clear that compliance even with unitary systems is extraordinarily difficult for small businesses already.[10]

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[9] Much direct marketing activity is of a "business-to-business" nature, and does not involve sales to individual consumers of consumer products. Thus, exemptions in many states for goods that are used as an ingredient or component part of some other product, for goods used in manufacturing or processing, for equipment or parts, or for containers or packaging materials, may also come into play.

[10] For example, in Congressional hearings in 1988, Bob Edmund, the president of a small mail order catalog company that distributed scientific equipment, painted a striking portrait of the difficulties involved in administering these types of exemptions in just one state:

> Of our $13 million in sales last year, roughly $9 million went to schools and industry. This is where we think the complications and the burden would be greatest for us.
>
> Because in New Jersey, for every educational institution that buys from us, we must determine first whether they are exempt or they are not. . . .
>
> For those who are exempt, we must maintain a tax number on our computer, plus we must have a hard copy of their exemption certificate on file.
>
> This represents many file cabinets for the State of New Jersey. If we had to do this for all the States, I think we would have to put on a little bit bigger room on to our building to do it.
>
> Next problem that comes is that the telephone is a way of doing business. So when Paterson High School calls me up and says, we need $20 worth of microscope slides and we have to have them right away; would you ship those out to us? We go ahead and do that based on the purchase order number, and we will take the exemption number over the phone.

[Continued]

The frequency of reporting to taxing officials and the dates on which those reports must be filed also vary widely. Some states require monthly returns; some require quarterly returns; some require monthly payments

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[10] [Continued]

> Now, that gets shipped out. They get billed. We have to follow up and make sure they send us a hard copy exemption certificate. And they don't always bother to do that. Sometimes you write 3 and 4 letters to them before you have it.
>
> If we don't bother to do that, when we get audited by the State, the first thing they ask for when they come in is, let's see your file of exemption certificates, and they match it to orders, and if we don't have them, we get penalized.
>
> Industrially, the problem is equally complex. Let's say RCA and Princeton buy products from us. They give us an exemption number. We put that on file. We have to, again, have a hard copy of their exemption certificate on file.
>
> Today they sent us an order and they asked for 200 lenses, and a $3,000 research microscope. And we have the exemption number. Now, the question that arises here on the 200 lenses, it certainly is conceivable they are going to build them into a product and sell them to somebody else so they are exempt.
>
> On the $3,000 research microscope it is a big question. If they are going to use it for research, it is exempt. If they are going to use it in the quality control department, it is not exempt.
>
> And the burden is technically upon us to determine what is the case.
>
> Now, it is frankly impossible for us to do that. So if the order comes in, and they have an exemption certificate, and an exemption number on it, we have just got to presume that the whole thing is exempt and do it. . . .
>
> But when we get audited, this is another area where we get our hands slapped. Because the auditor comes in and says, you sold them that research microscope. You should have guessed that it wasn't exempt. You are at fault.
>
> And they go on from there.
>
> On the consumer side, it is much simpler for us. In the State, just about everything we sell is taxable, and the few items that are not are so few that I guess we simply came to the policy that we would tax all consumers on everything they

[Continued]

with an annual return. Tax Guide at ¶ 250 (July 2, 1991). The quarters also vary. For example, New York's quarterly returns must be filed in March, June, September, and December, but Iowa's quarterly returns must be filed in January, April, July, and October. Tax Guide at ¶ 250. The dates for filing both monthly and quarterly returns vary among the states, with some being due on the 15th of the month, others due on the 20th, or the 25th, or the last day of the month. Tax Guide at ¶ 250. There is a variety of exceptions to these rules. For example, in Wisconsin the reporting period generally is quarterly, but it is monthly if the quarterly tax is over $600. Tax Guide at ¶ 250 n.25. Often, the exceptions read like a parody on taxing bureaucracy run amok. In North Dakota, itself, for example, payment generally must be made quarterly, but it must be made monthly, on the last day of the next succeeding month, if total sales exceed $330,000, "except for taxes collected during May of each odd-numbered year, which are payable on or before the twenty-second day of June of that year." N.D. Cent. Code § 57-40.2-07(4) and (7). In short, each state has its own reporting periods and due dates, which are not coordinated with each other. When local jurisdictions are added, the situation moves from impossibly complex to ludicrous.

Nor is there any standardized reporting format. This problem was recognized even by proponents of legislation to permit states to impose use tax requirements on direct marketers under these circumstances. James L. Martin,

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[10] [Continued]

buy from us in New Jersey. The few little items that aren't just are not significant.

But the problem would be if we go out into other States where the exemptions would cover a broader category of our products, that this would not be possible for us today.

So we would have to take our 7,000 products and start to categorize them into what is exempt and what is not. Now, that is no easy task to do.

1988 Hearings at 80-81.

Legislative Counsel for the National Governors' Association, when addressing the administrative issues that would arise if these taxes could be imposed, noted that "[s]ales taxes are levied in 46 States and each one has its own rules and regulations regarding how the tax is to be collected. The Governors would support any reasonable proposal to impose uniform reporting and remittance regulations." 1985 Hearings at 72.

These problems are compounded by the multitudinous changes that occur in use tax requirements every year. As of 1986, the number of yearly changes in sales and use tax laws for state and local jurisdictions was about 400 to 500 per year. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097, 1098 (1986).

A local retailer operating in only one jurisdiction may be able to stay abreast of the state and local sales tax requirements that are applicable to his products, including the constant changes in those requirements. For a small direct marketer, mailing to all 50 states, the task would be well-nigh unthinkable.

B. Permitting Multiple Jurisdictions to Impose Use Tax Obligations Would Cause Direct, Serious Financial Harm to Direct Marketers and Would Discriminate Against Interstate Commerce.

The most obvious and direct financial burden on direct marketers would be the increased personnel costs that would be incurred to cope with the tax laws of thousands of jurisdictions. The amounts will vary from company to company, but these burdens will fall with disproportionate weight on small direct marketers, since even the smallest direct mail firms probably will have to comply with the regulations of all taxing states, and many local jurisdictions. Mr. Edmund, the president of the scientific equipment supply company whose testimony was referenced in note 10, above, provided an indication of the magnitude of the likely personnel costs:

> . . . I hear proponents of the bill say that this is just a simple matter. You just put it in your computer, you buy the program and it is going to do all the work for you, I think they are forgetting about the paperwork that goes behind this.
>
> The computer doesn't call up and collect these exemption certificates. The computer doesn't make the decisions about who is exempt and who isn't exempt. These things have to be done by human beings.
>
> Presently on our staff we have approximately 130 people. One person's job is strictly to take care of the New Jersey sales tax. So I guess we would be hiring a lot of people if we go into this.

1988 Hearings at 81.

It is also virtually certain that orders would be lost due to the increased complexity of the forms that consumers would have to fill out to order merchandise. In a local retail store, only the tax of that state and locality need be considered, and the tax can be automatically computed for the customer at the time of the sale. But for many types of direct marketing, payment must accompany the order. Thus, as William T. End, an executive of the L.L. Bean Company, testified in Congressional committee hearings:

> [W]e would have to include [in our catalog] a complicated set of instructions setting forth rates and exemptions for the various states. Moreover, special instructions would have to be provided for the situations where the person ordering the goods lives in one state, but he or she is sending the goods to a resident of another state. . . .
>
> The success of direct marketing depends upon making the transaction as simple as possible. Once we make mail order complex and confusing for our customers, we discourage their doing business with us.

1988 Hearings at 206.

Furthermore, the need to devote more of the scarce catalog space to tax tables means less product description, hence fewer choices for the consumer, hence fewer sales for the direct marketer—all at greater cost. Mr. End testified that, for L.L. Bean, using catalog space to explain these rates and exemptions "would have had a direct cost in 1987 of $950 thousand and an opportunity cost of $9.5 million of lost sales by reason of devoting valuable catalog space for this purpose." 1988 Hearings at 206. As an alternative, the direct marketer might ask the consumer to estimate the amount of use tax applicable in his jurisdiction. But often consumers will fail to include the use tax, or will underpay it. One direct marketer testified before Congress as to why his company must often simply absorb the loss, rather than attempting to collect unpaid sales taxes for 70 different taxing districts in New York State:

> We remit the taxes whether we collect them or not and that is exactly what we do. We remit it and we don't collect it. We live with it because it is only one State. To do that process on a 46 taxing district basis, to remit moneys that we cannot collect—practically collect—that is, from an efficiency point of view we cannot collect it—certainly we have the right to refuse the order, but not when it is a $35 order and you have the merchandise sitting in the warehouse. And you would like to turn that piece of merchandise into cash.
>
> You look at the $1.25 or the $0.95 or the $0.55, and you say: We will pay it ourselves. But I would hate to do that for 46 States.

1985 Hearings at 122 (Testimony of Alan Glazer, President, Bedford Fair Industries, Ltd.).

Local retailers can compute sales tax for the jurisdiction or two in which they are located, and are able to ensure that the customer pays it before he or she receives the purchased merchandise. If direct marketers were required to collect use tax, by contrast, they would be forced

to incur heavy personnel expenses to comply with the laws of multiple jurisdictions, lose sales due to the enormous complexity of communicating tax information to consumers, and often pay use taxes that, in practical terms, cannot be collected from customers. In short, interstate commerce will be subjected to burdensome discrimination that is not applied to local commerce if the North Dakota Supreme Court decision is allowed to stand.

C. Small Direct Marketers Would Be Subject to Burdensome Enforcement of Uncertain Laws.

For 25 years *Bellas Hess* has provided a bright-line test that is understandable by the many constantly changing direct marketers and taxing authorities who are affected. It has prevented undue burdens on interstate commerce, and has allowed interstate businesses to choose intelligently when they will establish a "physical presence" within a state and thus subject themselves to its taxing jurisdiction. Overruling that decision would convert the bright-line into a foggy quagmire of countless enforcement efforts and lawsuits to define anew the limits of state power to tax out-of-state mail order vendors.

For example, "regular or systematic solicitation," the North Dakota statutory phrase for invoking the use tax, has been interpreted administratively to mean "three or more separate transmittances of any advertisement or advertisements during a testing period." App. at A56. If this interpretation is constitutional, is there any principled difference between three "transmittances" and two, or between two and one? Is a statute, such as North Dakota's, constitutional when it permits use taxes to be imposed only on the basis of magazine advertisements (no matter how small), or television advertisements, alone, or telephone solicitations, alone, without any direct mailings? As money-starved states and localities continue their efforts to increase tax revenues, statutes and administrative interpretations permitting use taxation based on "contacts" of this evanescent sort will continue to extend

their reach, and the disputes thereby engendered will be resolved only after decades of litigation.

Small direct marketers cannot afford to contest enforcement efforts by distant jurisdictions that ordinarily will involve—by litigation standards—relatively small sums of money. They will be presented with a stark choice: Pay up, or stop doing business in the state. Unlike local retailers, they will be subject to audit by multiple jurisdictions. In every taxing state, tax enforcement officers are armed with financial and/or criminal penalties to coerce compliance.[11] Faced with the demands of multiple jurisdictions, the pressure on small direct marketers to comply with even the most unreasonable or unjust exactions will be overwhelming.

IV. THE NORTH DAKOTA SUPREME COURT RELIES UPON ILLUSORY SUPPOSITIONS IN SURMISING THAT THE UNDUE BURDENS ON INTERSTATE COMMERCE RECOGNIZED IN *BELLAS HESS* NO LONGER EXIST.

The North Dakota Supreme Court offered three theories for its position that the burdens recognized in *Bellas Hess* no longer justify the rule established in that case: That the burdens can be substantially alleviated by computers; that the allowance of a 01.5 percent administrative cost deduction further alleviates these burdens, and that this

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[11] With regard to sales and use taxes, the All States Tax Guide states succinctly:

> Penalties are imposed by all tax statutes. The penalties may consist of fines, interest, assessment of additional tax, plus penal penalties. They are imposed for various statutory violations, such as failure to report or pay any tax, not complying with registration, or violations relating to a resale or exemption certificate. Nearly all noncompliance with a tax statute will bring on penalties.

Tax Guide at ¶ 5700 (March 21, 1989). The North Dakota statute provides various penalties, and makes "failing to comply with any of the provisions of this chapter" a Class A misdemeanor. N.D. Cent. Code § 57-40.2-15(4) (Supp. 1991).

Court lately has "all but ignored" the burdensome nature of the collection duty.

A. There Is No Basis for Finding That Computers or Technology Have Greatly Alleviated These Burdens.

The North Dakota Supreme Court—without referring to any pertinent record evidence—theorized that "computer technology" has greatly alleviated the burdens recognized in *Bellas Hess*.[12] That theory is far from established, especially for smaller companies. More important, it is the type of judgment that courts are ill-equipped to make. In response, Amicus notes that the North Dakota court appears to be basing its decision in this regard on uninformed speculation about the state of computer technology and use. And, common knowledge indicates that such speculation is misinformed.

For a computer to perform all or some of the administrative tasks necessary to ameliorate the obvious burdens, there must first be "application software," usually a commercial package, that the computer can run.[13] However, computers come in a variety of types, from mainframes costing millions of dollars, to minicomputers costing tens or hundreds of thousands of dollars, to workstations, to microcomputers ("personal computers"). An

[12] The North Dakota court did cite several factors that it believed established "Quill's extensive computer expertise." App. at A27 n.10. While it may be doubted that these factors truly prove any such "expertise," the more significant point is that the expertise of Quill itself is irrelevant to the important question before this Court. All direct mailers, particularly small ones, do not possess such expertise. Presumably, the constitutional power of states to obligate out-of-state direct marketers to collect and pay use tax does not depend upon an individualized determination of the computer expertise of each such company.

[13] The alternative to purchasing a commercial software application package would be for the company to program the computer itself. For the magnitude of the tasks at issue here, a staff of professional computer programmers would be necessary, probably working in conjunction with accountants and attorneys.

application written to run on one type of computer ordinarily will not run on others without modification or without being wholly rewritten. Within these categories of computers, there are different brands, different operating systems, and different architectures. Some are compatible with each other, and some are not. Thus, the computer market is divided into a number of incompatible niches, and there is no guarantee that application software can or would be marketed to fill all of these niches. Therefore, even if a small direct marketer already had a computer system of sufficient capacity, it may well be that no application software would be marketed *for that company's system* for purposes of computing use taxes for 6,000 to 7,000 jurisdictions.[14] In such a case, the direct marketer would have to buy new computer hardware as well as expensive software, assuming such software were available.

Furthermore, nothing guarantees that this software, even if available for a particular computer system, would be compatible with the accounting, bookkeeping, order processing, or other software used by a particular direct

[14] Apparently, there is at least one company that markets a software product for computing use tax. Westphal, *The Computer's Role in Simplifying Compliance with State and Local Taxation*, 39 Vand. L. Rev. 1097 (1986) (written by the president of the company marketing the product). The article does not disclose the types of computers on which this product will run. For mail order sales, the article states that the "customer would be told on ordering to remit the state and local taxes due. The sales tax rate file then would be used to verify that the correct amount had been remitted." *Id.* at 1101-02. Thus, computers would not solve the problem of incorrect calculation or omission of use tax by consumers. In 1990, this software package cost "approximately $12,000 initially, with a subsequent annual maintenance fee approximating $9,500." White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 796 n.132 (1991) (citing to a May 28, 1990, telephone conversation with Jeff Westphal, Vice President, Vertex, Inc.).

marketer. Thus, manual re-entry of the use tax data might well be necessary for many companies. It also is not established that all of the taxing jurisdictions would accept computer-generated forms for reporting purposes. Thus, manual re-entry of computer generated information onto the forms prescribed by state and local taxing jurisdictions may still be required.

The testimony of direct marketer Alan Glazer before Congress, regarding his company's experience with the 70 sales tax districts in New York State, is instructive in this regard:

> I am saying this with some reluctance, that is to come forward with the following information, although it is known back home: Four years after installing our first computer, and we are now on our second one valued at a half million dollars or more, we are still calculating the sales tax manually for the State of New York because we can't get the computer to differentiate between gross sales and net sales, the difference where people return goods, sales of various items in various districts.
>
> It is easy for people who do not live with a computer to say, based on advertising, oh, the computer will do it. . . .
>
> It is easy to say the computer will handle it. Four years and hundreds of thousands of dollars after installing that system, it does not properly calculate sales tax for 70 different taxing districts.

1985 Hearings at 121-22.

B. The 01.5 Percent Deduction Does Not Remove, or Significantly Ameliorate, the Burdens Imposed on Direct Marketers from Collecting Use Tax.

The North Dakota Supreme Court suggested that the burdens recognized in *Bellas Hess* now have been alleviated significantly because the State of North Dakota allows direct mailers to deduct 01.5 percent of the use tax due as compensation for administrative burdens. App. at A26; N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). This deduction does not even come close to providing any significant amelioration of the burdens discussed above.

The members of this Coalition may serve as examples. As previously noted, the median gross revenue of the members is $8.5 million. If we assume that one-half of one percent of $8.5 million in sales were to North Dakota customers, the company would have a total sales volume of $42,500 in that state.[15] Applying a tax rate of five percent, the use tax on these sales would be $2,125. One and one-half percent of $2,125—the amount that the direct mailer would retain under the North Dakota deduction—would be $31.87, an amount that would pay few administrative costs, especially if they involved legal and accounting services.

A study by the national accounting firm of Touche, Ross in 1986 reported that use tax compliance costs amounted to almost 16 percent of each dollar of use tax collected. See White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor*, 42 Fla. L. Rev. at 795 (citing Touche, Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multistate Sales Tax Collection* (Oct. 1986) (prepared for the Direct Marketing Association)). This may well underestimate compliance costs for small firms, but still would put compliance costs at more than 10 times the amount of the deduction made available by North Dakota.

C. This Case Will Answer the Question About This Court's Views on Burdens.

The question of whether the North Dakota court is correct in finding that this Court has "ignored" the bur-

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[15] One-half of one percent is probably a considerable overestimate. The sales and gross receipts taxes collected by North Dakota in 1989 were only 00.27 percent of the sales and gross receipts taxes collected by all states. Tax Guide at ¶ 210-A (Nov. 6, 1990) (based on U.S. Commerce Department figures).

densome nature of tax collection across jurisdictional lines is mooted by the Court's taking this case.

CONCLUSION

Bellas Hess has provided a clear and workable rule for 25 years. Overruling it would plunge thousands of businesses into a Byzantine administrative and financial nightmare. Mandating the types of measures that conceivably could reduce some of the burdens on direct marketers—such as a de minimis threshold for sales, uniform reporting forms, uniform reporting periods, uniform rates, imposition of a single use tax by states and local jurisdictions combined—would appear to be beyond the competence of any court.

The rule in *Bellas Hess* should be reaffirmed, and the decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

MEMBERS OF THE COALITION FOR SMALL DIRECT MARKETERS

Airline Int'l Luggage, Inc.
El Paso, TX

AKA Elephant
San Francisco, CA

All Computer Services
Asheville, NC

American Stationary Company, Inc.
Peru, IN

Arista Surgical Supply Co., Inc.
New York, NY

Aspen Imaging Int'l
Lafayette, CO

Auto Custom Carpets, Inc.
Anniston, AL

AW Direct, Inc.
Kensington, CT

Baron Barclay Bridge Supplies
Louisville, KY

Bass Pro Shops, Inc.
Springfield, MO

Biobottoms, Inc.
Petaluma, CA

Black Box Corporation
Pittsburgh, PA

Bloc Publishing
Coral Gables, FL

Boudin Gifts
San Francisco, CA

Broadcast Services
Four Oaks, NC

Broadcast Supply West
Tacoma, WA

Bulbtronics, Inc.
Farmingdale, NY

Cahill & Company
Washington, DC

Catalog Media Corporation
Memphis, TN

Celebrating Excellence
Lombard, IL

Celebration
Lumberton, NJ

Chelsea & Scott, Ltd. d/b/a One Step Ahead
Deerfield, IL

Christian Book Distributors
Peabody, MA

Communication Industry Corporation/National Audio Visual
E. Rutherford, NJ

Computer Reset
Dallas, TX

Crest Fruit Company
Alamo, TX

CSI Industries
Hudson, IA

CUI, Inc.
Wilmington, NC

Dalco Athletic Lettering
Dallas, TX

Damark International, Inc.
Brooklyn Park, MN

Daniel Smith, Inc.
Seattle, WA

Dartek Computer Supply Corporation
Elmhurst, IL

DAW Industries, Inc.
San Diego, CA

Dental Arts Laboratory, Inc.
Peoria, IL

Desserts Direct, Inc.
Oradell, NJ

Digi-Key Corporation
Thief River Falls, MN

Dunns, Inc.
Grand Junction, TN

Durr-Fillauer Orthopedic, Inc.
Chattanooga, TN

EduCALC, Corporation
Laguna Niguel, CA

Educorp Computer Services
San Diego, CA

Enco Mfg. Co.
Chicago, IL

Enomoto Roses, Inc.
Half Moon Bay, CA

Export USA Publications
Minneapolis, MN

Exposures, Inc.
S. Norwalk, CT

Express Direct
Chicago, IL

Fanfare Enterprises, Inc. d/b/a The Music Stand Catalog
Lebanon, NH

First National Fixture Corporation
Wichita, KS

Fish Net, Inc.
Lancaster, PA

Flight Computing Catalog Div. Azure Tech.
San Jose, CA

French Creek Sheep & Wool Co., Inc.
Elverson, PA

Friddle's Orthopedic Appliances, Inc.
Honea Path, SC

Gall's, Inc.
Lexington, KY

Goodson Shop Supplies
Winona, MN

Gump's
San Francisco, CA

Hello Direct, Inc.
San Jose, CA

Holtkamp Greenhouses, Inc.
Nashville, TN

Humboldt Industries, Inc.
Hazelton, PA

Insight Distribution Network, Inc.
Tempe, AZ

International Microsystems, Inc.
Kutztown, PA

Kansas City Steak Company
Kansas City, MO

Keller Laboratories, Inc.
St. Louis, MO

Key Note Music Group
Ranchos De Taos, NM

King of the Mountain Sports, Inc.
Loveland, CO

Klingspor Abrasives, Inc.
Hickory, NC

Knight's LTD Catalogue
St. Louis, MO

Lakeshore Learning Materials
Carson, CA

Landmark/SuperSoft
Clearwater, FL

LaserColor Labs
West Palm Beach, FL

Layline, Inc.
Raleigh, NC

LCR Corporation
Baton Rouge, LA

Long's Electronics, Inc.
Irondale, AL

Lounsbury, Inc. d/b/a Play Fair Toys
Boulder, CO

Lovejoy Tool Company
Springfield, VT

MacLand, Inc.
Tempe, AZ

Markson Science, Inc.
Phoenix, AZ

Marshal Graphics, Inc.
Hartford, CT

Medical SelfCare, Inc.
Healdsburg, CA

MicroProse Software, Inc.
Hunt Valley, MD

Mid America Designs
Effingham, IL

Mid-American Growers
Granville, IL

Mill Pond Press, Inc.
Venice, FL

Miller Aviation, Inc.
Johnson City, NY

Moore Medical Corporation
New Britain, CT

Museum Of Jewelry
San Francisco, CA

Music For Little People
Redway, CA

Musician's Friend, Inc.
Medford, OR

Mysteries By Mail
Boonville, CA

New England Hobby Supply, Inc.
Manchester, CT

Our Business Machines, Inc.
Irwindale, CA

Outer Banks Marine Outfitters
Beaufort, NC

Overton's Sports Center, Inc.
Greenville, NC

Paper Direct
Lyndhurst, NJ

Parkell
Farmingdale, NY

Pasternack Enterprises
Irvine, CA

Personal Computing Tools, Inc.
Los Gatos, CA

Pinnacle Orchards
Medford, OR

Pittman & Davis, Inc.
Harlingen, TX

Playboy Enterprises, Inc.
Chicago, IL

Plow & Hearth, Inc.
Orange, VA

PMIC
Los Angeles, CA

Practicon, Inc.
Greenville, NC

Production Tool Supply Company
Warren, MI

Professional Displays, Inc.
Covina, CA

Publishing Services, Inc. d/b/a PSI Research
Grants Pass, OR

Pyraponic Industries Inc. II
San Diego, CA

Quartermaster
Long Beach, CA

Ralph Storrs, Inc.
Kankakee, IL

Real Goods Trading Corp.
Ukiah, CA

Reasonable Solutions, Inc.
Medford, OR

Right Start Catalog
Westlake Village, CA

Rio Grande Albuquerque
Albuquerque, NM

Roseco, Inc.
Dallas, TX

Ross-Simons
Cranston, RI

Rutland Tool & Supply Co., Inc.
City of Industry, CA

Save Energy Company
San Francisco, CA

ScandAmerica Corporation
Lexington, KY

Specialized Products Company
Irving, TX

SportsTech Services, Inc.
Tulsa, OK

Stewart-MacDonald
Athens, OH

Storybook Heirlooms
Menlo Park, CA

Strategic Marketing Concepts
Clearwater, FL

Swest, Inc.
Dallas, TX

Sybervision Systems, Inc.
Pleasanton, CA

System Connection
Orem, UT

T-Shirt City, Inc.
Cincinnati, OH

Tasty Baking Company
Philadelphia, PA

The Company Store, Inc.
LaCrosse, WI

Thomas Scientific
Swedesboro, NJ

Tritronics, Inc.
Abingdon, MD

Tweeds, Inc.
Edgewater, NJ

20th Century Plastics
Los Angeles, CA

Venus Swimwear, Ltd.
Jacksonville, FL

W. Atlee Burkee & Co.
Warminster, PA

W.M. Green & Company
Robersonville, NC

West Marine Products
Watsonville, CA

White Flower Farm
Litchfield, CT

Wholesale Trophies, Inc.
Huntsville, AL

Wiese Vet Supply
Eldon, MO

Williams Tool & Hardware Supply
Fort Worth, TX

Wind & Weather
Mendocino, CA

WinterSilks/The White Pine Co., Ltd.
Middleton, WI

Woodworker's Supply Inc.
Casper, WY

APPENDIX B

EXEMPTIONS FROM SALES AND USE TAX IN NORTH DAKOTA

The following are exempt from sales and use tax:

Adjuvants sold to-used by vegetable producers or commercial applicators if required by product warranty
Admissions to state or local fairs—not in publicly owned facility
Advertising, periodicals
Agricultural fertilizers (commercial)
Aircraft (excise taxed)
Aircraft services
Artificial devices for crippled
Auction sales or personalty owned by non retailer
Bad debts (credit or refund)
Basic care facility, sales by-to
Beneficiated coal
Bibles, sales to nonprofit religious organizations
Bladder dysfunction supplies equipment and devices
Boarding homes for aged and infirm (licensed by ND social service board), sales to
Bottled water
Byproducts from processing farm products used for steam or electricity
Canadians, sales to, over $40, pay tax & claim refund for over $25
Charitable activities, receipts from
Churches, regular sales by (all receipts for church use)
Church suppers or bazaar (annual) on public property
Coal, beneficiated
Coal used in agricultural processing or sugar beet refining plants instate or in adjacent states
Coins, legal tender
Components of taxable end-product

Constitutionally exempt
Containers (for manufacturers, etc.)
Contractors, sales to (with certificate)
Credit unions (Fed.-ND)
Crutches
Currency, legal tender
Diabetic supplies (incl. properly dispensed insulin; insulin materials, glucose for insulin reaction, urine and blood testing kits, hypodermic needles etc.)
Disableds—equipment attached or modifying MV or implements of husbandry (motorized), elevators, lifts, etc., for home, sales to
Drugs for feeds (livestock-poultry)
Drugs (prescription)
Educational activities
Electricity
Electronic gaming device (licensed) receipts
Eyeglasses, prescription
Facsimile (FAX) services (not purchases to supply FAX services)
False teeth
Feeds (livestock, poultry, rabbit)
Fertilizers (commercial)
Flight simulators and related equip.
Food-food products (specified staples; not bottled water, diet supplements, alcoholic beverages) off-premise consumption, for humans
Food-food product samples for human consumption on premises
Food for schools
Food samples for eating at food stores
Food stamp sales
Foreclosure sales (mortgagee bid)
Fraternities-sororities, sales by
Fungicides (commercial)
Gasoline (otherwise taxed)
Governments (US agencies, state-local), sales to (certificate)

Health associations (voluntary; nonprofit per IRC)
Hearing aids
Herbicides (commercial)
Hospital services
Hymnals, sales to nonprofit religious organizations
Indian reservation, delivery to Indians on
Indian reservation, sales by non-Indians to Indians
Indian sales on reservation
Insecticides
Insurance premiums
Interstate commerce
Laundries (coin-operated)
Magazine subscriptions
Manufacturing or processing, goods used in (if end-product taxed)
Mfg. mach'y-equip. for new or expanded plant (eff. 7-1-91; was taxed at lower 3% rate)
Meals and related items sold to non-profit org. for delivery to invalids
Medical oxygen by user
Medical research institute (nonprofit), sales to (eff. 7-1-91)
Mobile home rentals (over 30 days by same persons)
Mobile home, resale for first buyer
Money
Montanans, sales to, over $50
Motion picture rentals (admissions taxed)
Motor vehicles (excise-taxed)
MV rentals
Newspapers
Newsprint and ink (for newspapers)
Nursing and intermediate care facilities, sales to
Nursing home services
Occasional sales (not MVs)
Ostomy devices and supplies
Outstate retailers, instate delivery to
Oxygen (prescription)
Periodicals of nonprofit organizations
Periodical subscriptions

Personal Services (separately stated)
Power plant (built post-6-30-91) production equip. (eff. 7-1-91)
Prefab-modular-sectional home rentals (over 30 days)
Prescription drugs
Professional services
Prosthetic devices
Religious activities, receipts from
Religious books sales to nonprofit religious organizations
Rentals, goods (sales-taxed in ND)
Resale, sales for
Room (lodging) rentals (30 day (min.) by same persons)
School districts (public) admissions
School lunch programs, food for
School supplies (private nonprofit schools-colleges)
Schools, food supplies for
Seed treatments, inoculants, fumigants for agriculture (commercial)
Seeds, roots, bulbs, small plants (commercial use)
Services (no goods)
Specially state taxed items (gasoline, insurance premiums)
Steam used for processing farm products
Student meal tickets
Students, food for (college contract)
Subscriptions
Telephone calls (interstate)
Textbooks to students
Textbooks (private nonprofit schools-colleges)
Trade-in for resale item
Transport services—passenger, freight by common carrier (if title passed to buyer)
Upholstery service
Urine testing
Vending machine sales (under .16 cents)
Veterinarian service

Water
Wheelchairs

Use tax exemptions in addition to the above:

Items stored in-state for out-of-state use
Items subject to ND sales tax
Items subject to sales or use tax of another state (if reciprocal)
Nonresident's goods temporarily in-state
Railway cars and locomotives, interstate, plus component parts

All States Tax Guide at ¶ 1340 (June 11, 1991) (citing as source N.D. Cent. Code Ch. 57-39.2 et seq.; L. 1991; H1048, 1308, and 1606, S2098 and 2393).